Supreme Court, U.S.
FILED

00 133 JUL 24 2000

OFFICE OF THE CLERK

No. _____ 00

In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

JURISDICTIONAL STATEMENT

BILL PRYOR
Attorney General of Alabama

ALICE ANN BYRNE
Assistant Attorney General
JOHN J. PARK, JR.*
Assistant Attorney General
CHARLES B. CAMPBELL
Assistant Attorney General
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

**Counsel of Record*

DORMAN WALKER
BALCH & BINGHAM, LLP
2 Dexter Avenue
Post Office Box 78
Montgomery, AL 36101
(334) 269-3138

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the District Court err in concluding that white residents of white-majority legislative districts established standing under *United States v. Hays*, 515 U.S. 737 (1996), to bring claims of unconstitutional racial gerrymandering when they pointed to adjoining black-majority districts and otherwise failed to show a personalized injury?

2. Did the District Court err in refusing to apply laches as a bar to the Plaintiffs' claims?

3. Did the District Court err in rejecting the Alabama Supreme Court's conclusion, reached after briefing by the parties, that *Shaw* claims like those of the Plaintiffs are moot?

4. Did the District Court err in adjudicating the merits of a *Shaw* redistricting case where no relief within the confines of Alabama's system of government was workable?

5. Did the District Court err in concluding that Alabama State Senate districts 21, 25, 29, and 30, and Alabama House of Representatives districts 63, 75, and 86, are the products of unconstitutional racial gerrymandering?

PARTIES TO THE PROCEEDINGS

A. Parties To This Proceeding.

Appellant James Bennett is the Secretary of State of Alabama. He was named, in his official capacity, as a Defendant below. Appellant, The State of Alabama, was also named as a Defendant below.

Appellants Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden are African-American voters of Alabama. They were also named as Defendants below. Throughout the proceedings, they have been represented by their own counsel. They filed their own notice of appeal and will file their own Jurisdictional Statement. The State Appellants and the Sinkfield Appellants will, however, jointly file an Appendix.

Sinkfield, Ross, Brooks, McKinnon, and Hayden were also the plaintiffs, individually and as the representatives of a class of African-American voters of Alabama, in the case styled *Sinkfield v. Camp*, Civil Action No. 93-689-PR, in the Circuit Court of Montgomery County, Alabama. In 1993, that case produced the legislative districting plan that was challenged by the Kelley Plaintiffs in this case.

Appellees Peggy C. Kelley, Daniel P. Brown, W. Ricardo Montiel, Karen D. Outlaw, Bibb Gunter, and Genae Spinks (the "Kelley Plaintiffs") are white residents of Alabama. They brought *Shaw*-based racial gerrymandering claims against the Alabama State Senate and State House of Representatives districts in which they live. The District Court ruled that one or both of their respective

PARTIES TO THE PROCEEDINGS – Continued

districts was unconstitutional and enjoined further elections in those districts as currently configured.[1]

B. Former Parties.

Hal Smith was also named as a Defendant below, in his official capacity as Probate Judge of Lee County, Alabama, but the claims against him were dismissed prior to judgment.

Kelly Brasher, Ann G. Hunter, Gonzalo F. Montiel, Camilla Rice, and John Rice, all white residents of Alabama, were Plaintiffs below but are not parties to this appeal. Brasher and Hunter voluntarily dismissed their claims before judgment. The District Court ruled against Montiel and the Rices before trial, and they did not cross-appeal.

---

[1] The State Defendants do not agree, however, that the Kelley Plaintiffs are "prevailing parties" within the meaning of *Farrar v. Hobby*, 506 U.S. 103 (1992).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

A. Parties To This Proceeding..... ii

B. Former Parties..... iii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... vi

JURISDICTIONAL STATEMENT..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISION INVOLVED..... 1

STATEMENT OF THE CASE..... 2

A. Legal Proceedings..... 2

1. The Rice Plaintiffs Challenge The Reed-Buskey Plan..... 2

2. The Rice Plaintiffs Go To State Court 4

3. Federal Court Proceedings Resume..... 5

B. Statement of Facts..... 7

ARGUMENT 10

I. The District Court Erred In Concluding That White Residents of White-Majority Districts Established Standing When They Pointed To Adjoining Black-Majority Districts And Otherwise Failed To Show A Personalized Injury..... 11

TABLE OF CONTENTS – Continued

Page

A. The *Hays* Test Requires That *Shaw* Plaintiffs Live In The District That Is The "Primary Focus" Of Their Claim 12

B. The District Court Misread *Hays* By Giving No Effect To The "Primary Focus" Inquiry.. 14

C. The District Court Erred In Equating Jurisdiction With The Merits 17

II. The District Court Erred In Refusing To Apply Laches As A Bar To The Plaintiffs' Claims 19

III. The District Court Erred In Rejecting The Alabama Supreme Court's Conclusion, Reached After Briefing By The Parties, That *Shaw* Claims Like Those Made By The Plaintiffs Are Moot.. 22

A. The District Court's Factual Errors Infect Its Mootness Analysis 22

B. The *Rooker-Feldman* Doctrine Bars The District Court From Revisiting The Alabama Supreme Court's Decision 24

IV. The District Court Erred In Adjudicating The Merits Of A *Shaw* Redistricting Case Where No Relief Within The Confines Of Alabama's System Of Government Was Workable 26

V The District Court Erred In Concluding That Alabama State Senate Districts 21, 25, 29, And 30, And Alabama House Of Representatives Districts 63, 75, And 86, Were The Products Of Unconstitutional Racial Gerrymandering 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999) 30

Bush v. Vera, 517 U.S. 952 (1996) 29

Christian Television Corp. v. RCH Broadcasting, Inc., 554 So. 2d 989 (Ala. 1989) 26

Costello v. United States, 365 U.S. 265 (1961) 21

Dale v. Moore, 121 F.3d 624 (11th Cir. 1997) 25

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 24

Farrar v. Hobby, 506 U.S. 103 (1992) 29

Fouts v. Harris, 88 F. Supp. 2d 1351 (S.D. Fla. 1999), *affirmed sub nom. Chandler v. Fouts*, 120 S. Ct. 1716 (2000) 20

Growe v. Emison, 507 U.S. 25 (1993) 19

Holder v. Hall, 512 U.S. 874 (1994) 26, 27

Mandel v. Bradley, 432 U.S. 173 (1977) 20

Maryland Citizens for a Representative Gen'l Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970) 20

Maxwell v. Foster, Civil Action No. 98-1378 (W.D. La. Nov. 24, 1999) 20, 21

Miller v. Johnson, 515 U.S. 900 (1995) 21

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995) 27

Reynolds v. Sims, 377 U.S. 533 (1964) 20, 22

TABLE OF AUTHORITIES

Page

Rice v. Sinkfield, 732 So. 2d 993 (Ala. 1998) ..... *passim*

Rice v. Smith, 988 F. Supp. 1437 (M.D. Ala. 1997) 1

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 24

Ruhrgas A. G. v. Marathon Oil Co., 526 U.S. 574 (1999) 18

Russell v. Todd, 309 U.S. 280 (1940) 19

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 18

Thompson v. Smith, 52 F. Supp. 2d 1364 (M.D. Ala. 1999) ..... *passim*

Thornburg v. Gingles, 478 U.S. 30 (1986) 26, 27

United States v. Hays, 515 U.S. 737 (1995) ..... *passim*

Wesch v. Folsom, 6 F.3d 1465 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994) 20

White v. Daniel, 909 F.2d 99 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991) 20, 21

STATUTES

28 U.S.C. § 1253 (1994) 1

28 U.S.C. § 2284 (1994) 4

42 U.S.C. § 1973c (1994) 3

Ala. Code § 29-1-4 (1998) 7

JURISDICTIONAL STATEMENT

James Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama, defendants below, appeal from the Final Judgment and Injunction of the United States District Court for the Middle District of Alabama, entered April 24, 2000, in which the District Court declared that Alabama Senate districts 21, 25, 29, and 30, and Alabama House of Representatives districts 63, 75, and 86, are the unconstitutional products of racial gerrymandering and enjoined Bennett from conducting any elections for those districts without the court's prior approval.

OPINIONS BELOW

The April 24, 2000, majority opinion of the District Court and the dissenting opinion of United States District Judge Myron H. Thompson are published at 96 F. Supp. 2d 1301 (M.D. Ala. 2000). They appear in the Appendix at 1a and 54a, respectively. Previous decisions from earlier phases of this and related litigation are included in the Appendix and include, *inter alia*, those reported at *Thompson v. Smith*, 52 F. Supp. 2d 1364 (M.D. Ala. 1999); *Rice v. Sinkfield*, 732 So. 2d 993 (Ala. 1998), and *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997).

JURISDICTION

The District Court's judgment was entered on April 24, 2000. Bennett and the State of Alabama filed notice of appeal to this Court on May 23, 2000. App. at 91a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 (1994).

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment, which is reprinted in the Appendix at 373a.

STATEMENT OF THE CASE

This case involves *Shaw*-based challenges to the districting plan for the Alabama Legislature. That plan was adopted in 1993, and elections under it were held in 1994. No challenge was made until May 1997. While that challenge was pending, the last elections under that plan were held in 1998. The challenge did not come to trial until January 2000, and was not ruled on until April 2000. The District Court declined to order special elections, in November 2000[2] or otherwise, but did enjoin the State from holding any more elections in four State Senate districts and three State House districts under the current plan. In ordering this relief, the District Court rejected the State's contentions that the Kelley plaintiffs lacked standing, that their claims were barred by laches, that their claims were moot, and that relief was futile, as well as the State's defenses on the merits. The State renews each of those defenses in this appeal.

A. Legal Proceedings.

1. The Rice Plaintiffs Challenge The Reed-Buskey Plan.

Alabama's current legislative districting plan is known as the Reed-Buskey plan. The Reed-Buskey plan was adopted through a consent judgment entered by the Circuit Court of Montgomery County in 1993 in a case styled *Sinkfield, et al. v. Camp*. "Camp" was Billy Joe Camp, then the Secretary of State of Alabama, and the Sinkfield parties were Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden, individually and as the representatives of a class of African-American voters (the "Sinkfield Defendants").

---

[2] Such elections would have been interim elections because the legislature serves four-year terms, and the next elections for the legislature are not scheduled until November 2002.

The Circuit Court of Montgomery County entered a "Partial Consent Judgment Regarding Legislative Redistricting and Requiring Voting Rights Act Preclearance" on May 11, 1993. In the Partial Consent Judgment, the Circuit Court retained jurisdiction to enforce the decree and order further relief until a lawful plan had been adopted and precleared in accordance with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1994). While preclearance was pending, this Court decided *Shaw v. Reno*, 509 U.S. 630 (1993). On August 13, 1993, after preclearance had been obtained, the Circuit Court entered a "Final Judgment Concerning Legislative Redistricting," in which it, *inter alia*, finally approved the Partial Consent Judgment.

On May 2, 1997, John and Camilla Rice, for themselves and on behalf of a class of non-African-American voters (the "Rice Plaintiffs"), filed suit in the United States District Court for the Middle District of Alabama. They contended that the Reed-Buskey plan was unconstitutional in that it failed to meet one-person-one-vote standards and diluted their votes, and that the State Senate and House of Representatives districts in which they lived were the products of unconstitutional racial gerrymandering. The Rice Plaintiffs, who live in Lee County, Alabama, named Hal Smith, in his official capacity as Probate Judge of Lee County, James Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama as defendants (the "State Defendants"). They also named Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden, individually and on behalf of African-American voters (the "Sinkfield Defendants"), as defendants. Thus, the defendants in the federal court action included all of the parties to *Sinkfield v. Camp*.

The Rice Plaintiffs sought injunctive relief, including adoption of a new districting plan in time for the 1998 Legislative elections. Elections under the Reed-Buskey plan had been conducted without objection in 1994, and the next scheduled Legislative elections were in November 1998.

In their Answer, the State Defendants contended, *inter alia*, that the court should defer to the Alabama Legislature for a remedy, and that the Rice Plaintiffs' claims were barred by laches.

2. The Rice Plaintiffs Go To State Court.

Pursuant to 28 U.S.C. § 2284 (1994), a three-judge federal district court was convened. On August 14, 1997, the District Court directed the Rice Plaintiffs to move to intervene in the state court redistricting case that produced the Reed-Buskey plan, now styled *Sinkfield v. Bennett*, within 15 days. The Rice Plaintiffs intervened as directed. As set forth in greater detail below, other plaintiffs sought to join the federal court lawsuit, but chose not to follow the Rice Plaintiffs to state court. On September 4, 1997, the Circuit Court of Montgomery County granted the Rice Plaintiffs' motion to intervene.

On September 23, 1997, the District Court ruled that it would "stay its hand for a reasonable time to allow a determination to be made by the state court as to the constitutionality of the reapportionment plan contained in the 1993 consent decree, in light of later Supreme Court decisions [*i.e.*, the *Shaw* line of cases]." The District Court further scheduled a hearing for November 26, 1997, stating that it would proceed on the merits if "the constitutionality of the 1993 consent decree has not been resolved by the state court at that time."

The Circuit Court of Montgomery County conducted a trial on the Rice Plaintiffs' claims in November 1997. It had set a deadline for the intervention of other plaintiffs, but none sought to intervene. On November 20, 1997, the Circuit Court of Montgomery County ruled against the Rice Plaintiffs on each of their claims. App. at 156a-179a. The Rice Plaintiffs then gave notice of appeal to the Alabama Supreme Court.

In a December 18, 1998 decision, the Alabama Supreme Court dismissed the Rice Plaintiffs' appeal as moot. It reasoned that their "request for modification of

the 1993 consent judgment – which is based on the 1990 federal census – . . . would not affect future legislative elections." App. at 198a. In concluding that the appeal was moot, the court endorsed the contention of the State Defendants and rejected the Rice Plaintiffs' argument to the contrary. *See* App. at 344a – 345a; 358a-360a. The Alabama Supreme Court explained, "[W]e must conclude that the elections held in 2002 and subsequent years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 census." App. at 198-99a. The court added that none of the exceptions to mootness recognized by this Court were applicable. *Id.* at n.1. While it dismissed the Rice Plaintiffs' appeal as moot, the Alabama Supreme Court did not direct vacatur of the trial court's judgment. The Rice Plaintiffs did not petition this Court for a writ of certiorari to review the Alabama Supreme Court's decision.

3. Federal Court Proceedings Resume.

On August 29, 1997, through the "First Amendment to Verified Complaint," eight new plaintiffs sought to assert *Shaw* claims as well as one-person-one-vote and vote dilution claims in the pending federal lawsuit. *See* App. at 145a-51a. These plaintiffs (Andrew Thompson, Peggy C. Kelley, Gonzalo F. Montiel, Ann G. Hunter, Daniel P. Brown, W. Ricardo Montiel, M.D., Karen D. Outlaw, and Kelly Brasher) were joined by Bibb Gunter, who filed a "Second Amendment to Verified Complaint" on September 12, 1997. *See* App. at 152a-55a. All of them, including Gunter, were referred to as the "Thompson Plaintiffs" until Thompson's claims were resolved against him on dispositive motions before trial. The plaintiffs have since been referred to as the "Kelley Plaintiffs." As noted above, none of the Kelley Plaintiffs sought to intervene in the state court proceeding. Instead, the District Court stayed consideration of their claims until those state-court proceedings, including appeal, were resolved.

On July 2, 1999, after lifting the stay, the District Court entered an order dismissing the Kelley Plaintiffs' one-person-one-vote and vote dilution claims on the ground that the state court judgment against the Rice Plaintiffs resolved those claims. In addition, the District Court held that Plaintiff Andrew Thompson's *Shaw* claim against SD 28 was barred by *res judicata*. Finally, the District Court ruled that the case would proceed as to all other claims and unaddressed defenses. *See* App. at 201a-218a.

That ruling left the *Shaw* claims of the following Kelley Plaintiffs unresolved: Andrew Thompson (HD 82), Peggy Kelley (HD 88 and SD 30), Gonzalo Montiel (HD 101 and SD 34), Ann Hunter (HD 75 and SD 25), Daniel P. Brown (HD 73 and SD 25), Ricardo Montiel (HD 63 and SD 21), Karen Outlaw (HD 89 and SD 30), Kelly Brasher (HD 41 and SD 14), and Bibb Gunter (HD 86 and SD 29). Shortly before trial, the District Court granted motions for summary judgment directed at Thompson's HD 82 claim, Kelley's HD 88 claim, and Brown's HD 73 claim. The District Court had previously allowed Brasher to dismiss her claims with prejudice and allowed Spinks to substitute for Hunter because Hunter no longer wanted to proceed. Finally, the District Court denied as untimely Gonzalo Montiel's motion to amend his complaint to allege residency in the correct House district and granted motions for summary judgment directed at his HD 101 claim.

As a result of these rulings, seven Kelley Plaintiffs (Daniel P. Brown, W. Ricardo Montiel, Karen D. Outlaw, Bibb Gunter, Peggy Kelley, Genae Spinks, and Gonzalo Montiel) brought *Shaw* claims relating to five Senate districts (SD 21, 25, 29, 30, and 34) and four House districts (HD 63, 75, 86, and 89) to trial. The District Court heard testimony and argument for six days in January 2000.

On April 24, 2000, the three-judge District Court held that four Senate districts (SD 21, 25, 29, and 30) and three House districts (HD 63, 75, and 86) were the products of unconstitutional racial gerrymandering. The District Court ruled against Plaintiff Gonzalo Montiel as to SD 34 and Plaintiff Karen Outlaw as to HD 89. The District Court

declined to order that the unconstitutional districts be redrawn and placed on the ballot in November 2000, but did enjoin the State from conducting any further elections in those seven districts. In entering its Judgment and Injunction, the District Court rejected the State Defendants' contentions that the Kelley Plaintiffs lacked standing, their claims were barred by laches, their claims were moot, and injunctive relief was not appropriate, as well as defenses on the merits.

One judge dissented. He concluded that the Kelley Plaintiffs lacked standing and contended that the majority had erred in rendering a decision that resulted in no substantive relief. He explained, "Whether the issue is viewed as one of mootness . . . or issue preclusion . . . [,] the current redistricting plan is too near the end of its life to afford any effective substantive relief." App. at 71a-72a (Thompson, J., dissenting) (footnote omitted).

On May 23, 2000, the State Defendants and the Sinkfield Defendants gave notice of appeal to this Court. *See* App. at 91a, 94a, respectively.

B. Statement of Facts.

Alabama adopted its current legislative plan, the Reed-Buskey Plan, in 1993. The last regularly scheduled elections under this plan were held in 1998. The Reed-Buskey Plan inherited certain critical features from the previous legislative plan. These include the number of Senate districts (35) and House districts (105) and the practice of "nesting" or grouping three House districts inside each Senate district. For example, the geographic area within Senate district 21 (SD 21) is congruent with the combined geographic areas of House districts 61, 62, and 63 (HD 61, *etc.*), which are nested within it.

When the Rice Plaintiffs filed suit on May 2, 1997, the Alabama Legislature's 1997 regular session was nearly over. By law, the Legislature's 1997 regular session began on the second Tuesday in February, and it was limited to 30 legislative days and 105 calendar days. *See* Ala. Code

§ 29-1-4 (1998) and Amendment notes. On May 2, 1997, the Legislature had consumed 26 of its 30 legislative days and could not have run longer than May 19, 1997, in any event. At that time, the Legislature was consumed with the particularly difficult issues of a state parks bond, tort reform, and budgets for the next fiscal year.

The relevant characteristics of the legislative districts at issue in this appeal and their related plaintiffs include the following.

SD 21/HD 63 – Ricardo Montiel

Montiel moved to the city of Tuscaloosa and SD 21/HD 63, in July 1997; before that he lived in another part of the State. SD 21 and HD 63 are within the acceptable range of ideal populations under the 1990 census, as are all other challenged districts. SD 21 is 81% white and 17% black,[3] and HD 63 is 83% white and 15% black.

Montiel claimed neither a stigmatic nor a representational injury. He had no knowledge of how the legislative districts he challenged were drawn. When he was asked for "any evidence that race was a consideration in the drawing of" several districts, including SD 21/HD 63, he candidly responded "No, and that's not even a concern of mine." App. at 372a. Montiel's "concern" was not race, but simply his general dissatisfaction with the shape of his Senate and House districts. He testified they had "an unusual look." *See* App. at 371a.

Montiel had never read the complaint filed in his name. App. at 372a. He did not testify at trial. Legislators and other witnesses testified at trial that the predominant reasons for the shapes of SD 21/HD 63 were not racial, and generally had to do with incumbent interests, the need to adequately populate districts, and preserving communities of interest.

---

[3] The population figures reflect total population according to the 1990 Census.

SD 25/HD 75 – Genae Spinks

Genae Spinks lives in Montgomery County in SD 25/HD 75. SD 25 and the three House districts nested within it (HDs 73, 74, and 75) are majority white. SD 25 is 86% white and 12% black, and HD 75 is 78% white and 20% black. SD 25 includes parts of Montgomery and Elmore counties and shares Montgomery County with SD 26. SD 26 nests HDs 76, 77, and 78, and all of these districts are majority black. SD 26 lies completely within Montgomery County. According to the 1990 census, Montgomery County was some 16,000 persons short of being able to support two Senate districts.

In her deposition, Spinks said that she was able to elect the Senator and Representative of her choice, and that both of them did a good job. She described her complaints as dissatisfaction that her House district includes part of Elmore County and that the lines for SD 26 and its nested House districts were "gerrymandered to give an unfair advantage to blacks, frankly." Spinks did not testify at trial.

SD 29/HD 86 – Bibb Gunter

Bibb Gunter lives in the city of Dothan in Houston County, and in SD 29/HD 86. SD 29 is 74% white and 25% black. It contains HDs 85, 86, and 87, and all or parts of four counties. SD 29 adjoins SD 28. SD 28 is 38% white and 58% black.

HD 86 lies entirely within Houston County, and is bounded on two sides by the states of Florida and Georgia. HD 86's population is 84% white and 15% black.

Gunter believes that the shapes of SD 29 and HD 86 were "racially motivated to help the black," "to help the black, minority or whatever you want to call it, get their areas like they needed to be." He objects to the fact that the Reed-Buskey Plan was drawn "to include the majority of black votes in different segments of the districts and senate to help them [black people] – to help them to be able to put a black representative and have a stronger

voice." Consequently, he, as "a white person," was "living in a district that had been manipulated the way it was drawn to help the blacks," and this was "unfair" to him.

Gunter has not, however, been prejudiced by being placed in SD 29 and HD 86. He has been able to elect the Senate and House candidates of his choice, and he thinks they have "done a fairly good job." Moreover, he testified in deposition:

> Q. Can you tell me how you're injured by being placed in House 86? Have you been injured by being in House District 86?
>
> A. I don't think so. I don't think I've been injured.
>
> * * * *
>
> Q. Have you suffered any injury to any constitutional rights by being placed in Senate 29 that you know of?
>
> A. No, sir. If I have, I'm not aware of it. And as far as that goes, I don't know if anybody that has, black, white, or whatever.

SD 30 – Peggy Kelley

Kelley resides in SD 30, which comprises all or parts of seven counties. The district is 72% white and 27% black. Although SD 30 has a shape that invites inquiry, there was ample testimony at trial from state legislators and other witnesses to establish that the shape of SD 30 was dictated by the need to find enough people to bring the district within range of ideal population, to protect the incumbent, and to link communities of interest. Kelley did not testify at trial.

ARGUMENT

With the 2000 Census already underway and no further legislative elections scheduled until 2002, the District Court directed the State of Alabama not to conduct any more elections in seven legislative districts without the District Court's permission. The effect of this ruling is

evanescent because, with the receipt of Census data during March 2001, the Alabama Legislature is due to redraw the State's districting plan for both houses in a way that satisfies one-person-one-vote standards and this Court's *Shaw* jurisprudence. This fleeting "relief" was awarded in favor of six white residents of white-majority districts that adjoin black-majority districts, none of whom filed suit until 1997. Along the way, five other plaintiffs dropped out completely, including two whose *Shaw* claims were held to be moot by the Alabama Supreme Court.

This Court should summarily reverse the District Court's decision or, in the alternative, note probable jurisdiction for several reasons. First, the District Court's conclusion that the plaintiffs have standing conflicts with this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995). As the dissent points out, the District Court majority fails to give effect to this Court's rejection of reliance on a neighboring district to establish standing. *See* App. at 66a-67a (quoting 515 U.S. at 746). Second, the District Court's rejection of the equitable defense of laches conflicts with the decisions of at least two other three-judge district courts. Third, the District Court's treatment of the mootness argument conflicts with this Court's *Rooker-Feldman* jurisprudence. For these and other prudential reasons, the District Court's injunction is improperly intrusive. Finally, the District Court's rulings on the merits are clearly erroneous.

I. The District Court Erred In Concluding That White Residents of White-Majority Districts Established Standing When They Pointed To Adjoining Black-Majority Districts And Otherwise Failed To Show A Personalized Injury.

This Court should summarily reverse the District Court's decision, or note probable jurisdiction, because the District Court's conclusion conflicts with this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995). The District Court held that white residents of white majority

districts, who failed to show that they had suffered any stigmatic or representational injury, established standing merely by showing that they lived in districts that adjoin newly-created black majority districts. This conclusion is inconsistent with *Hays* and guts the requirements for standing that *Hays* established.

A. The *Hays* Test Requires That *Shaw* Plaintiffs Live In The District That Is The "Primary Focus" Of Their Claim.

In *Hays*, this Court held that the Hays appellees lacked standing because they

> do not live in the district that is the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification.

Id. at 739. Observing that identifying the individualized injury that standing requires in the racial gerrymandering context "may not be easy," this Court explained:

> Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. . . . On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

Id. at 744-45. This Court next pointed to the absence of specific evidence of the plaintiffs' having been subjected to a racial classification. Then, significantly, it rejected reliance on both individual challenges to the plan as a

whole, *i.e.*, global challenges, and on the configuration of a neighboring district to establish standing. Global challenges do not suffice to establish standing because they do not lead to a conclusion that a particular plaintiff was injured by a racial classification. *Id.* at 746. Neighboring districts do not establish standing either:

> [E]ven assuming, *arguendo*, that the evidence in this litigation is enough to state a *Shaw* claim with respect to District 4, that does not prove anything about the legislature's intentions with respect to District 5, nor does the record appear to reflect that the legislature intended District 5 to have any particular racial composition. Of course, it may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment. We have never held that racial composition of a particular voting district, without more, can violate the Constitution.

Id. at 746 (citations omitted).

In this case, the Kelley Plaintiffs, with one exception,[4] complained that the district in which they live would have looked different if the adjoining majority black district had been drawn differently. They characterized their use of the demographics and shape of the adjoining black-majority district as "evidence" that an unconstitutional racial intent affected the drawing of their districts. In *Hays*, this Court characterized such a showing as a generalized complaint

---

[4] The exception is Bibb Gunter's complaint regarding Senate District 29. Gunter lives in that Senate district, but the primary focus of his challenge was HD 85, in which he does not reside. Even if Gunter had standing to challenge SD 29's configuration, his claims are due to be denied on the ground of laches, claim preclusion, or no practical relief.

about the racial composition of a voting district that, "without more," does not violate the Constitution. *See Hays*, 515 U.S. at 746.

Even so, the District Court concluded that all of the Kelley Plaintiffs had standing. The District Court concluded that a *Shaw* plaintiff satisfies *Hays* by showing "(1) that he lives in the district he challenges and (2) that the district is 'racially gerrymandered.' " App. at 5a. Applying this reading of *Hays*, the District Court concluded that each of the Kelley Plaintiffs who, in its view, proved a case of racial gerrymandering had standing. Conversely, the Kelley Plaintiffs who did not prove that they lived in racially gerrymandered districts had their claims dismissed for lack of standing.

The District Court's conclusion is factually and legally flawed. As the dissent points out, the majority's approach reads the "primary focus" limitation out of *Hays*. App. at 59a-60a (Thompson, J., dissenting). Doing so goes hand in hand with the majority's decision to ignore the fact that this Court rejected reliance on the demographics of neighboring districts to prove standing in *Hays*. *See* App. at 66a-67a (Thompson, J., dissenting) (quoting *Hays*, 515 U.S. at 746). Second, as the District Court acknowledged, its reading of *Hays* "admittedly conflates Article III jurisdiction with the merits. . . . " App. at 5a.

B. The District Court Misread *Hays* By Giving No Effect To The "Primary Focus" Inquiry.

The District Court erred in its treatment of what it termed "the vagueness of the infinitely manipulable term 'primary focus.' " App. at 3a. Put simply, the majority overlooked it, concluding that, because the Kelley Plaintiffs had alleged that they "challenge[d] the districts in which they vote," there was no need to inquire further. App. at 4a. In *Hays*, however, this Court concluded that the Hays appellees lacked standing, not because they failed to challenge the districts in which they voted, but, rather, because, in the first instance, they did not live in

the district that was the "primary focus" of their claim. 515 U.S. at 739 (emphasis added). Contrary to the District Court's view, this Court illustrated the meaning of "primary focus" in *Hays* when it held that a *Shaw* plaintiff does not establish standing by making a global challenge or by pointing to the demographics of neighboring districts. *Id.* at 746. That is what the Kelley Plaintiffs did, however, as the dissent explains. *See* App. at 66a-67a. By abandoning the "primary focus" inquiry, the District Court allowed the Kelley Plaintiffs to manipulate that "infinitely manipulable term."

Instead of complaining about the perceived lack of clarity in the "primary focus" test, the District Court should have looked to the entirety of the *Hays* opinion for guidance. In particular, the District Court should have given effect to this Court's instruction that proof of intent as to one district says nothing about the intent as to an adjoining district. As this Court noted, "[I]t may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment." *Hays*, 515 U.S. at 746.

The dissent correctly points out that the Kelley Plaintiffs had done no more than to show that the racial composition of their districts would be different if the neighboring districts had been drawn differently. *Hays* says that such a showing is not enough to establish standing because it does no more than "assert[ ] . . . a generalized grievance against governmental action" of which the Kelley Plaintiffs disapprove. *Id.* at 746. The dissent explains:

> In the case before us, as in *Hays*, this deeper inquiry into the evidence behind the plaintiffs' claims reveals that their primary focus is to attack the majority-black districts that neighbor their own, rather than to challenge only their districts or to vindicate their own right to equal protection of the laws. The plaintiffs have failed

> to produce even a shred of evidence demonstrating that the drafters of the current legislative districting plan formed an independent intent to place whites in their districts or consciously created white-majority districts to achieve personal or political ends. Nor have they provided any specific evidence suggesting that they personally were placed in their districts because of race. Rather, the plaintiffs' objection is to the deliberate creation of majority-black districts for the purpose of increasing black voting power in Alabama. The creation of these majority-black districts necessarily caused the neighboring districts to change shape, admittedly quite substantially at times, and resulting in rather irregular boundaries. Nevertheless, the only sense in which the plaintiffs object to the way their own districts were drawn is insofar as their districts represent the negative space out of which the objectionable majority-black districts were carved.

App. at 62a-63a (Thompson, J., dissenting).

That characterization is correct. Dr. Reed testified that, when he drew the Reed-Buskey plan, one of his goals was to increase African-American representation in the State Legislature. He operated in a zero-sum environment: Each new black-majority district meant one fewer white-majority district. Significantly, new or reconfigured black-majority districts adjoin the districts in which the Kelley plaintiffs live. As the dissent points out:

> Plaintiff Ricardo Montiel's objections to SD 21 focus on the portions of Tuscaloosa County included in neighboring majority-black SD 24 and therefore necessarily left out of his own district. His objections to the shape of HD 63 focus on the same portions of Tuscaloosa, which were placed in majority-black HD 70 rather than in his own district. Plaintiffs Daniel Brown and Genae Spinks, who reside in SD 25, object to their own district only to the extent that it was shaped by

> the race-conscious drawing of neighboring SD 26. Spinks's challenge to HD 75 primarily alleges that her district should have included areas that were instead placed in HD 76 for racial reasons. Plaintiffs Peggy Kelley and Karen Outlaw purport to object to SD 30, but the focus of their claim is the racially-motivated drawing of SD 23 in Lowndes County, and of SD 29 in Dale County. While nominally objecting to HD 89 and HD 86, plaintiffs Karen Outlaw and Bibb Gunter complain primarily of how the shape of their districts was dictated by the drawing of neighboring majority-black HD 85.

App. at 63a-64a (Thompson, J., dissenting); *see also* App. at 41a (Majority opinion) ("Being on HD 85's periphery puts HDs 89 and 86 within the zone of effects of HD 85.")

The District Court's erroneous treatment of *Hays* allowed plaintiffs who live in white-majority districts to attack the neighboring black-majority districts. That reading threatens widespread litigation that merely bows in the general direction of standing after the next round of redistricting. This Court should reverse the District Court's decision and reinforce the rule of *Hays*.

C. The District Court Erred In Equating Jurisdiction With The Merits.

The District Court's "confla[tion]" of standing with the merits produces an absurd result. It means that only two outcomes are possible in a *Shaw* case: the plaintiff prevails on the merits, or the plaintiff who does not prevail on the merits has his claims dismissed for lack of standing. *Cf.* App. at 5a ("Th[e] second prong of the *Hays* test . . . will have to wait until we finish discussing the merits. . . . "); App. at 54a (conclusion includes dismissal of claims challenging HD 89 and SD 34 "as well as all districts for which summary judgment was granted, for want of jurisdiction.") In either event, the State is obligated to defend on the merits. The majority acknowledges that its approach is unusual, producing "a situation not

often encountered," but asserts that this is what *Hays* "strongly implies." App. at 5a. What *Hays* is said to imply, however, is belied by what it says: "[T]he judgment of the District Court is vacated, and the cases are remanded with instructions to dismiss the complaint." 515 U.S. at 747. This Court did not need to review the merits of the *Hays* Respondents' claims in order to conclude that they had no standing, and neither did the District Court in this case.

More generally, the District Court's approach runs afoul of this Court's rejection of the concept of "hypothetical jurisdiction" in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998). There, this Court characterized standing as a "threshold jurisdictional question," noting, "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Id.* at 102. Addressing the practice of "hypothetical jurisdiction," which lower federal courts had used to proceed to the merits without addressing jurisdictional issues, this Court "decline[d] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94.

The District Court's conflation of standing and merits in this case, and its implicit endorsement of that approach in *Shaw* cases generally, gives rise to two kinds of structural concerns: separation of powers concerns and federalism concerns. The absence of standing is a jurisdictional defect, and courts that pronounce on the constitutionality of state laws or actions when there is no jurisdiction act ultra vires. *See Steel Co.; see also Ruhrgas A. G. v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction . . . keep the federal courts within the bounds that the Constitution and Congress have prescribed.") Here, plaintiffs who failed in their attempt to show that the State had acted unconstitutionally in drawing one or both of their districts were held to have lacked standing only after a trial on the merits.

The District Court's willingness to adjudicate the merits of State action before deciding standing also entails

federalism costs. In *Growe v. Emison*, 507 U.S. 25 (1993), this Court reiterated its "recognition" that reapportionment is primarily a duty of the States not the federal courts. *Id.* at 34. Just as this Court instructed the federal courts to yield to ongoing state proceedings in redistricting cases in *Growe*, in order to avoid trampling on state prerogatives, the federal courts should make sure of their jurisdiction before judging the constitutionality of state districting efforts. The District Court's conflation approach promises only future intrusion.

In this case, the standing question should not have been so difficult for the court. The State Defendants took the deposition of each Plaintiff and put standing before the District Court through dispositive motions. This effort was, inexplicably, to no effect. For example, Plaintiff Peggy Kelley testified that she was satisfied with HD 88, the House district in which she lived. App. at 362a. The District Court granted the State Defendants' motion for summary judgment as to that claim but did not address Kelley's testimony disclaiming any controversy. *See* App. at 219a-225a. Similarly, Plaintiff, Ricardo Montiel, who moved to Tuscaloosa after the plan had been used in the 1994 election, thought his House and Senate districts have "an unusual look," but testified that race was not "a concern of mine." App. at 371a-372a. The District Court denied the State Defendants' motion for summary judgment as to Ricardo Montiel's claims without explanation. The other Kelley Plaintiffs gave no indication of having suffered a representational or stigmatic injury.

II. The District Court Erred In Refusing To Apply Laches As A Bar To The Plaintiffs' Claims.

Under "the doctrine of laches, . . . equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would prejudice a defendant." *Russell v. Todd*, 309 U.S. 280, 287 (1940). In the redistricting context, the disinclination to consider claims made late in a decennium serves state interests in "the need for stability and continuity in the

organization of the legislative system. . . . " *Reynolds v. Sims*, 377 U.S. 533, 583 (1964). Accordingly, "courts are reluctant to redistrict shortly before a new census, which might require yet another reapportionment." *Wesch v. Folsom*, 6 F.3d 1465, 1472 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994).

The District Court's decision not to apply laches conflicts with two recent decisions by three-judge courts and with a decision of the Fourth Circuit. Three-judge district courts sitting in Florida and Louisiana applied laches to bar claims that would have resulted in the redrawing of district lines for the 2000 elections. *See Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) (three-judge court), *affirmed sub nom. Chandler v. Fouts*, 120 S. Ct. 1716 (2000);[5] *Maxwell v. Foster*, Civil Action No. 98-1378 (W.D. La. Nov. 24, 1999) (three-judge court).[6] Both of these decisions, which were rendered in late 1999, were brought to the attention of the District Court, but were not addressed, distinguished, or even cited. These decisions relied on the Fourth Circuit's decision in *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). *See also Maryland Citizens for a Representative Gen'l Assembly v. Governor of Maryland*, 429 F.2d 606, 610 (4th Cir. 1970).

Those courts have noted the disruptive effect of redistricting lawsuits brought late in the decade. As the Fourth Circuit explained:

> If we affirm the district court's order, the Board will be required to reapportion itself this year and it will probably be required to do so again next year, when the results of the 1990 Census are available. We believe that two reapportionments within a short period of two years would

---

[5] This Court's summary affirmance is a rejection of the challenges presented in the jurisdictional statement. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

[6] A copy of the Order Granting Defendants' Motion for Summary Judgment in *Maxwell* has been lodged with the Clerk of the Court.

> greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens. Such a disruption is not justified when there will be no election prior to November 1991, at which time the court-ordered plan may no longer be appropriate because of new census information.

White v. Daniel, 909 F.2d at 104. Laches does not constitute a "permanent barrier" to claims, it simply defers judicial consideration of them until a time when relief can effectively be ordered. *Maxwell, supra*, at 9.

The same considerations apply in this case. None of the Kelley Plaintiffs sought to intervene in the federal lawsuit before August 29, 1997, after the 1997 regular session of the Alabama Legislature had ended. They then declined the opportunity to intervene in a state court action that they knew would have resulted in a 1997 trial. Instead, their case did not come to trial until January 2000. The District Court should have looked at the calendar and asked itself why it was trying a redistricting case in January of a census year.

Put simply, the Kelley Plaintiffs delayed in filing their case, failed to explain their delay, and the delay prejudiced the State. That showing satisfies the elements of laches. *See, e.g., Costello v. United* States, 365 U.S. 265, 282 (1961) ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."). The District Court's finding to the contrary is legally incorrect for two reasons. First, the District Court's conclusion that the Kelley Plaintiffs' delay was not unreasonable misses the point. *Miller v. Johnson*, 515 U.S. 900 (1995), told the Kelley Plaintiffs what they needed to show to prevail, but they dawdled, inexplicably, for two more years before commencing their action. If they had filed sooner, the State would not have been prejudiced. Second, the District Court's dismissal of the State's prejudice showing, which the court accomplished by denying the Kelley Plaintiffs the most intrusive

relief they sought, ignores the intrusiveness of the relief granted. *See, infra,* at 28.

Racial gerrymandering claims arise out of a process that a State undertakes anew every ten years. Once a State has redistricted, it is entitled to expect a period of stability. This Court said as much in *Reynolds v. Sims*. *See* 377 U.S. at 583-84. Voters who believe themselves to be victims of racial gerrymandering, vote dilution, or a violation of § 2 of the Voting Rights Act should attack the plan or their districts, as appropriate, promptly. The sooner they do so, the more reliable the preceding Census data will be and the greater the likelihood that a feasible remedy can be devised.

III. The District Court Erred In Rejecting The Alabama Supreme Court's Conclusion, Reached After Briefing By The Parties, That *Shaw* Claims Like Those Made By The Plaintiffs Are Moot.

In *Rice v. Sinkfield*, 732 So. 2d 993 (Ala. 1998), the Alabama Supreme Court held that all of the Rice Plaintiffs' claims, including their *Shaw* claims, were moot and dismissed their appeal from the Montgomery County Circuit Court's judgment against them. The District Court gave only limited preclusive effect to the Alabama Supreme Court's decision, declining to apply its conclusion that the Rices' *Shaw* claims were moot to the Kelley Plaintiffs. The District Court's decision rests on factual errors and runs afoul of the *Rooker-Feldman* doctrine.

A. The District Court's Factual Errors Infect Its Mootness Analysis.

The District Court proceeds on the asserted basis that the Alabama Supreme Court raised the mootness issue *sua sponte*, applied it to a limited claim for relief, and applied Alabama law. Each of these factual assertions is incorrect.

First, the State raised the issue of mootness, not the court *sua sponte*. The first argument in the State's brief in the Alabama Supreme Court was titled: "The Trial Court's

Judgment Should Be Vacated and This Case Dismissed As Moot." *See* App. at 344a-345a. In response, the Rice Plaintiffs asserted that the Alabama Legislature might not have a new plan in place by 2002, giving rise to "the possibility that the 2002 legislative elections will need to be conducted based on the districts at the time – districts put into place by the Reed-Buskey Plan." *See* App. at 359a. In addition, the Rice Plaintiffs pointed to the possibility that the State might need to call a special election to fill a vacancy. App. at 359a-360a. Thus, the parties placed both mootness and the proposed vacancy exception before the Alabama Supreme Court.

Second, the relief sought was not limited; it was, rather, time-bound. When the Rice Plaintiffs filed their Complaint-In-Intervention in state court in August 1997, they sought, *inter alia*, a declaration that HD 79 and HD 83 were unconstitutional, a declaration that the Partial Consent Decree that adopted the Reed-Buskey Plan was illegal and unenforceable, judicial redrawing of the district lines, and other preliminary and permanent injunctive relief. Subsequently, in their post-trial brief, which was filed in November 1997, the Rice Plaintiffs sought a preliminary injunction to prevent any further use of those districts until constitutional alternatives could be implemented. As late as November 1997, all of the Plaintiffs expected that, if they prevailed, new lines would be in place for the 1998 legislative elections. When the Rice Plaintiffs saw that the Alabama Supreme Court proceedings would carry into the middle of 1998, they started talking about 2002. *See* App. at 359a.

Third, the Alabama Supreme Court applied "the federal doctrine of mootness," not Alabama law. It stated:

> The Supreme Court of the United States has recognized several exceptions to *the federal doctrine of mootness* that are applicable to cases involving: (1) class actions where some members of the class still have a live case or controversy; (2) wrongs capable of repetition, yet evading review;

> (3) continuing collateral consequences to a party; and (4) voluntary cessation of injurious activity by a party who is free to resume it. . . . *The rationales underlying these exceptions are not applicable to this case.*

See App. at 199a-200a n.1 (emphases added) (internal citations and parentheticals omitted). The court's rejection of the "capable of repetition yet evading review" exception is responsive to the Rice Plaintiffs' arguments about no new plan and the possibility of vacancy. The cases cited are federal or universal in their discussion of mootness. Thus, the District Court's assertion that the Alabama Supreme Court applied Alabama law is incorrect.

These factual errors show that the District Court's conclusion is flawed. The Alabama Supreme Court rejected the same exceptions to mootness that the District Court point to. Thus, the District Court was, in fact, second-guessing the Alabama Supreme Court. This, it cannot do.

B. The *Rooker-Feldman* Doctrine Bars The District Court From Revisiting The Alabama Supreme Court's Decision.

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), this Court held that the federal courts lack jurisdiction to review the civil decisions of state courts for constitutional error. Such decisions can be reversed or modified only by this Court. As this Court explained, "To [reverse or modify a state court judgment] would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original." *Id.* at 416. Subsequently, in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that the federal district courts lack jurisdiction to hear complaints that are "inextricably intertwined" with state court judgments. *Id.* at 486-87. As the Eleventh Circuit has noted, "The *Rooker-Feldman* doctrine applies as long as the party had a reasonable opportunity

to raise his federal claims in the state court proceeding." *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997).

In this case, the District Court's application of *res judicata* principles at the preliminary summary judgment stage should have set the ground-work for the application of the *Rooker-Feldman* doctrine. The District Court held that the state-court judgment against the Rices barred the Kelley Plaintiffs' claims of one-person-one-vote and vote dilution violations.[7] The District Court further concluded that the Kelley Plaintiffs could not be "characterized as strangers to the state-court action and are more properly characterized as alter-egos of the Rice Plaintiffs." App. at 211a. Moreover, the District Court held that it would not offend due process to bind the Kelley Plaintiffs to the state-court litigation, noting

> The state court invited the [Kelley] plaintiffs to participate in the prior suit, and this court twice suggested that they do the same. The [Kelley] plaintiffs thus had notice of the state litigation and had ample opportunity to be heard. The Rice plaintiffs, moreover, expressly sought to represent a class that clearly includes the [Kelley] plaintiffs, and there is every reason to conclude that the state court took care to protect the interests of non-party class members. The [Kelley] plaintiffs were fully aware of these class claims and yet did nothing.

App. at 212a-213a.

Having thus equated the Rice Plaintiffs to the Kelley Plaintiffs with respect to global claims, the District Court should have equated them with respect to the global defense of mootness. The District Court declined to apply the Alabama Supreme Court's holding of mootness to the

---

[7] It also held that Plaintiff Andrew Thompson's *Shaw* claim against SD 28 was precluded. Subsequently, however, the District Court declined to hold that the Circuit Court's adjudication of SD 28 was preclusive of claims made from the opposite side of the boundary with respect to portions of SD 29.

Kelley Plaintiffs because, in its view, mootness was not "a single, certain and material point arising out of the allegations and *contentions of the parties.*" *See* App. at 10a, (quoting *Christian Television Corp. v. RCH Broadcasting, Inc.*, 554 So. 2d 989, 992 (Ala. 1989)) (emphasis added by District Court) (internal quotations omitted). As previously noted, the District Court's conclusion that the Alabama Supreme Court raised mootness *sua sponte* is incorrect. Moreover, the Kelley Plaintiffs wanted the same relief that the Rice Plaintiffs wanted, an interim election with redrawn districts.

The District Court should have equated the Kelley Plaintiffs with the Rice Plaintiffs for another reason: The same attorney orchestrated all the claims. The Kelley Plaintiffs included that attorney's father, his brother, his wife's grandmother, his former partner's father, the mother of a court reporter he frequently employed, and former clients. They all attacked the same plan from different directions, and all wanted the same global results. The 1998 election was the last one under the current plan for every one of the Kelley Plaintiffs. Their *Shaw* claims were just as moot as those of the Rice Plaintiffs.

IV. The District Court Erred In Adjudicating The Merits Of A *Shaw* Redistricting Case Where No Relief Within The Confines Of Alabama's System Of Government Was Workable.

This Court should summarily reverse the District Court's decision or note probable jurisdiction because the District Court adjudicated liability in the absence of an available remedy. The District Court's action conflicts with this Court's decisions in *Holder v. Hall*, 512 U.S. 874 (1994), and *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, the District Court's ruling is so fundamentally advisory in nature that it runs afoul of the "case or controversy" requirement that is the linchpin of federal-court jurisdiction.

In *Holder*, this Court held that the size of a governmental body does not provide the basis for a challenge under § 2 of the Voting Rights Act. Justice Kennedy, writing for himself, the Chief Justice and Justice O'Connor, stated:

> [W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.

Id. at 881. Justice Kennedy explained that "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* Similarly, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court observed that the failure to prove certain of the elements would show that a multi-member district structure was not the cause of the inability of minority voters to elect their preferred candidates. *Id.* at 50-51.

The Eleventh Circuit has drawn on *Holder* and *Gingles* in holding that the absence of a remedy precludes liability. *See Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995). The Eleventh Circuit stated:

> *Holder* . . . confirms that, from the inception of a section 2 case, the existence of a workable remedy within the confines of the state's system of government is critical to the success of a vote dilution claim. The absence of an available remedy is not only relevant at the remedial stage of the litigation but also precludes, under the totality of the circumstances inquiry, a finding of liability.

Id. at 1533 (citing *Gingles*, 478 U.S. at 51); *see also Nipper* at 1533 ("[T]he possibility of an acceptable remedy is essential to a successful section 2 vote dilution claim. . . . ")

In this case, the District Court did not find a remedy that is workable within the confines of Alabama's system of government. Instead, it intervened when intervention was unnecessary and imposed relief that is both unlikely

to be required and intrusive. Relief is unnecessary at this time because the State is due to redraw the entire plan in 2002, and changes to the current plan will certainly be made. For example, Representative Greg Wren, the incumbent in HD 75 testified that the population of his district has increased dramatically in the last decade. Without conceding that HD 75 as presently configured is unconstitutional, it is unlikely to be replicated in 2002. The explosive population growth in HD 75 shows that the 1990 Census, which would be the baseline for any court-ordered redrawing of districts, is too stale to use. In short, any problem with the Reed-Buskey plan is due to be fixed in the ordinary course of events, without court intervention.

The District Court's intervention is intrusive for several reasons. The District Court declared that no further elections are to be conducted in seven districts as currently configured but did not commit to ordering a special election in the event of a vacancy. *See* App. at 51a-52a. The likelihood that a special election will be needed to fill a vacancy in one or more of these seven districts before 2002 is minimal and diminishes every day. To conduct such a special election, the Legislature would likely have to: (1) meet in an expensive special session; and (2) use stale Census data for its work. It will then redraw one piece of a puzzle that will be completely redesigned in 2002. That special handiwork would not be usable after 2002 because it would have been redrawn with stale data. If the District Court ultimately tells the State to do all of this unnecessary work, it will be interfering with a function that is left to the State in the first instance.

In sum, the District Court imposed "no substantive relief at all." App. at 70a. (Thompson, J., dissenting) The State was going to correct any problems with this plan on its own, and, if it did not, a new court could consider the question in the context of new census data. It is unlikely that the District Court will have to order special elections. Thus,

> When all is said and done, the reality here is that all the plaintiffs will get from this court and from this litigation is their attorneys' fees and expenses from the defendants.

App. at 75a (Thompson, J., dissenting).[8]

V. The District Court Erred In Concluding That Alabama State Senate Districts 21, 25, 29, And 30, And Alabama House Of Representatives Districts 63, 75, And 86, Were The Products Of Unconstitutional Racial Gerrymandering.

The District Court's conclusion that these districts are unconstitutionally racially gerrymandered is clearly erroneous. Space limitations prevent a detailed discussion of all districts, but the State sets forth several reasons why the conclusion as to HD 86 is incorrect as an example of the District Court's errors.

1. First, the District Court erred in dismissing the State's evidence of compactness. *See* App. at 47a-49a. According to the standards that this Court has endorsed, HD 86 is compact. *See Bush v. Vera*, 517 U.S. 952, 960 (1996). Its dispersion compactness score is 0.511, and its perimeter compactness score is 0.397.

2. The District Court erred in tainting HD 86 with its proximity to HD 85. *See* App. at 41a ("Being on HD 85's periphery puts HDs 89 and 86 within the zone of effects of HD 85."). The State agrees that HD 85 was new under the Reed-Buskey plan, and was majority black in total population and plurality white in voting age population according to the 1990 Census. But a conclusion regarding the

---

[8] The Kelley Plaintiffs have requested that the District Court award them $583,298.42 in attorneys' fees and $46,708.97 in costs. The State does not concede that, even if the Kelley Plaintiffs are correctly held to be prevailing parties within the meaning of *Farrar v. Hobby*, 506 U.S. 103 (1992), they are entitled to the amounts claimed.

intent behind HD 85 says nothing about the intent behind HD 86. *See Hays*, 515 U.S. at 746.

3. The District Court's reliance on the placement of the northeast quarter of Dothan in HD 85 misses the point. The City of Dothan is the largest city in HD 86 and in Houston County, and, according to the 1990 Census, its northeast quarter is majority black. That quarter was placed in HD 85, but it has been split from the rest of Dothan since the 1983 plan. Thus, the Reed-Buskey plan preserved that preexisting division of Dothan and the voter expectations that went with it. Put another way, HD 86 would have to "annex" the northeast corner of Dothan to bring it within its lines, and the Eleventh Circuit has held that annexation is not a proper remedy for vote dilution claims. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999).

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the District Court's decision or note probable jurisdiction.

Respectfully submitted,

BILL PRYOR
Attorney General of
Alabama

ALICE ANN BYRNE
Assistant Attorney General
JOHN J. PARK, JR.
Assistant Attorney General
CHARLES B. CAMPBELL
Assistant Attorney General
Office of the Attorney
General
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

Counsel for Appellants

DORMAN WALKER
BALCH & BINGHAM
2 Dexter Avenue
Post Office Box 78
Montgomery, AL 36101
(334) 269-3138